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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 307

CIVIL

MONSON DRAY LINE, INC.,

Appellant,

vs.

MURPHY MOTOR FREIGHT LINES, INC., a Minnesota Corporation, and WITTE TRANSPORTATION COMPANY, a Minnesota Corporation,

Appellees.

APPEAL BY INTERVENER MONSON DRAY LINE, INC., FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION.

(Defendants United States of America and Interstate Commerce Commission have not appealed.)

MOTIONS TO DISMISS OR AFFIRM

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SUBJECT INDEX

	Page
Statement	2
Argument:	
Motion to Dismiss	3
Motion to Affirm	8

AUTHORITIES CITED

Cases:	Page
Alabama v. United States, 279 U.S. 229, 73 L.Ed. 675 (1929)	5, 7
American Trucking Assoc., Inc., v. United States, 344 U.S. 298	7
Benjamin v. Dubois, 118 U.S. 46, 30 L.Ed. 52 (1886)	3
Gospel Army v. Los Angeles, 331 U.S. 543, 91 L.Ed. 1662 (1947)	4
Louisville & N. R. Co. v. United States, 238 U.S. 1, 35 S.Ct. 696 (1915)	5, 7
Montgomery B. & C. T. C. v. Ledbetter Erec. Co., 344 U.S. 178, 97 L.Ed. 204 (1952)	4, 5
Pope v. Atlantic Coast Line R. Co., 345 U.S. 379, 97 L.Ed. 1094 (1953)	4
Radio Corp. of America v. United States, 341 U.S. 412, 95 L.Ed. 1062	8, 10
Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 92 L.Ed. 1212 (1948)	4
Rexford v. Brunswick-Balke-Collender Co., 228 U.S. 339, 57 L.Ed. 864 (1913)	4
Richmond v. Atwood, 52 Fed. 10 (1st Cir., 1892)	6
Taylor v. Breese, 163 Fed. 678 (4th Cir., 1908)	6
Urie v. Thompson, 337 U.S. 163, 93 L.Ed. 1282 (1949)	5
United States v. Capitol Transit Co., 338 U.S. 286	7
United States v. Great Northern R. Co., 343 U.S. 562	7

Page

United States v. Griffin, 303 U.S. 226, 82 L.Ed. 764 (1938) 6

United States v. Jones, 336 U.S. 641, 93 L.Ed. 938 (1949) 6

United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515 7

U. S. v. U. S. Smelting, Refining & Mining Co., 339 U.S. 186, 94 L.Ed. 750 ..... 4, 5

Virginian R. Co. v. United States, 272 U.S. 658, 71 L.Ed. 463 (1926) 7

Statutes:

28 U.S.C., Section 1253 2

28 U.S.C., Section 2101(b) 2 3, 4, 5, 6, 7

28 U.S.C., Section 2284 2

28 U.S.C., Section 2325 2

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MOTIONS TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal from the order and decree of the District Court be dismissed on the ground that the appeal has not been taken within the time allowed by statute, and, in the alternative, move that the order and decree of the District Court be affirmed on

the ground that the questions presented are so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the order and decree entered February 25, 1957, by a District Court of three judges especially constituted pursuant to 28 *U.S.C.*, Sections 2284 and 2325, which order and decree remanded the proceedings to the Interstate Commerce Commission for rehearing, in which rehearing all interested parties, including appellees, may have opportunity to be heard. The District Court held that no notice or opportunity to be heard was afforded appellees.

Notice of appeal to this Court was filed by appellant on April 22, 1957, an interval of 56 days since the coming down of the District Court decision.[1] Appellant claims that this Court has jurisdiction to review this decision by direct appeal pursuant to 28 *U.S.C.*, Sections 1253 and 2101(b) (Jurisdictional Statement, page 2).

It is appellees' position that under said statutes appellant's notice of appeal was not timely. For this reason, the Supreme Court of the United States should dismiss the appeal.

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[1]Time for filing Appellant's Jurisdictional Statement was extended to July 21, 1957.

ARGUMENT

MOTION TO DISMISS

28 *U.S.C.*, Section 2101(b), provides:

> "Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree appealed from, if interlocutory, and within sixty days if final."

Appellant's notice of appeal is not timely since it was not given thirty days from February 25, 1957, the date of the District Court's decree. The record is clear that notice of appeal to this Court was given by appellant on April 22, 1957, fifty-six days after the date of the decree (Jurisdictional Statement, page 2). If the order and decree was interlocutory, the notice of appeal should have been filed on March 27, 1957.

The District Court's order is not "final" within Section 28 *U.S.C.* 2101(b). The order is interlocutory. What is a "final" order for review or appeal purposes to this Court has been the subject of this Court's decisions in many cases, including Interstate Commerce Commission matters.

This Court has traditionally held that "final" for purposes of appeal under the various statutes means an order, judgment or decree that ends the litigation by fully determining the rights of the parties on the merits so that nothing remains to be done but the ministerial acts of entering the judgment directed by the Court. It is and has been the policy of this Court to avoid piecemeal appeals. In *Benjamin v. Dubois*, 118 U.S. 46, 30 L.Ed. 52 (1886), this Court said:

> "The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the Acts of Congress giving this court jurisdiction on appeals or writs of error, must terminate the litigation between the parties on the merits

of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree which had been rendered."

See also:

Pope v. Atlantic Coast Line R. Co., 345 U.S. 379, 97 L.Ed. 1094 (1953);

Rexford v. Brunswick-Balke-Collender Co., 228 U.S. 339, 57 L.Ed. 864 (1913);

Gospel Army v. Los Angeles, 331 U.S. 543, 91 L.Ed. 1662 (1947);

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 92 L.Ed. 1212 (1948).

28 *U.S.C.*, §2101(b), embodies the above definition of "final." As applied to appeals from the orders of a three-judge court, "final" means that the appealed order or decree completely determined the entire controversy between appellant and appellee upon the merits. Permanent injunctions are considered "final." See *Montgomery B. & C. T. C. v. Ledbetter Exec. Co.*, 344 U.S. 178, 97 L.Ed. 204 (1952); *U. S. v. U. S. Smelting, Refining & Mining Co.*, 339 U.S. 186, 94 L.Ed. 750.

In the instant case the entire proceeding was remanded to the Commission for rehearing.[2] In other words, the merits of the actual transportation controversy between appellant and appellees have not been heard or decided by either the three-judge court or the Commission. The lower court's order remanded the matter to the Commission so that the merits of the controversy might be heard there. Such an order cannot be "final" under either statutory or case law.

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[2]This matter was handled by the Commission on a "no hearing" procedure. No hearing was had. See Appendix B, page 20 of Appellant's Jurisdictional Statement under "Report and Order" of Joint Board No. 142, reciting "no oral hearing has been held in this proceeding, etc."

A temporary injunction is merely an interlocutory order under §2101(b) and not a final order within the purview of that Section. *United States v. United States Smelting, Refining & Mining Company*, supra; *Louisville & N. R. Co. v. United States*, 238 U.S. 1, 35 S.Ct. 696 (1915); *Alabama v. United States*, 279 U.S. 229, 73 L.Ed. 675 (1929). See also *Montgomery B. & C. T. C. v. Ledbetter Erec. Co.*, supra; *Urie v. Thompson*, 337 U.S. 163, 93 L.Ed. 1282 (1949).

In *United States v. U. S. Smelting, Refining & Mining Company*, supra, the District Court issued a temporary injunction enjoining the Interstate Commerce Commission from requiring its order to be carried into force and effect and remanded the proceedings to the Commission for rehearing. The Commission, after the rehearing, issued the same order and the District Court again enjoined the order. On appeal, to the United States Supreme Court, it was argued that the first District Court decision became law of the case as to the sufficiency of the evidence to sustain the Commission's order. The Supreme Court held that this was not the effect of the first District Court decision, saying:

> "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter. Messenger v. Anderson, 225 U.S. 436, 444, 56 L. Ed. 1152, 1156, 32 S. Ct. 739; Insurance Group Committee v. Denver & R. G. W. R. Co., 329 U.S. 607, 612, 91 L. Ed. 547, 550, 67 S. Ct. 583. It is not applicable here because when the case was first remanded, nothing was *finally* decided. The whole proceeding thereafter was in fieri. *The Commission had a right on reconsideration to make a new record.* Ford Motor Co. v. National Labor Relations Board, 305 U.S. 364, 374, 375, 83 L. Ed. 221, 230, 231, 59 S. Ct. 301. When finally decided, all questions were still open and could be presented. The fact that an appeal could have been taken from the first order of the District Court was not because it was a final adjudication but because a temporary injunction had been granted in

order to maintain the status quo. This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable[28 USCA §1253, FCA Title 28, §1253. The appellants might have appealed, but they were not bound to. We think that it requires a final judgment to sustain the application of the rule of the law of the case just as it does for the kindred rule of res judicata. * * *" (Our emphasis.) (339 U.S. 186, 198.)

Likewise, in the instant case, the "whole proceeding" is in fieri. The Commission, under the District Court's remand, will make a new record.

It is the position of the appellees that the foregoing authorities are controlling. The instant order was interlocutory and not final, and should have been appealed within thirty days.

A decree of the District Court remanding the case for rehearing is merely interlocutory. The District Court here did not prohibit appellant from operating as a carrier under the questioned certificate pending the rehearing. District Court decision 148 F. Supp. 471 at 475. The District Court's order in this case is appealable (within 30 days) as an interlocutory order in the sense that an interlocutory order is any intermediate order not constituting a final determination on the merits. See *Taylor v. Breese*, 163 Fed. 678, 684 (4th Cir., 1908); *Richmond v. Atwood*, 52 Fed. 10, 20 (1st Cir., 1892).

The Congressional purpose in departing from its traditional avoidance of piecemeal appeals to allow review of interlocutory orders under 28 *U.S.C.*, §2101(b), is the public interest in the speedy determination of the issues involved (within thirty days). Congress thus sought to eliminate the danger of interruption of service to the public pending the appeal. *United States v. Jones*, 336 U.S. 641, 93 L.Ed. 938 (1949); *United States v. Griffin*, 303 U.S. 226, 82 L.Ed. 764

(1938); *Louisville & N. R. Co. v. United States*, supra; *Alabama v. United States*, supra; *Virginian R. Co. v. United States*, 272 U.S. 658, 71 L.Ed. 463 (1926). No such danger of interrupted service exists in the instant case because appellant is permitted to continue operation during the rehearing.

United States v. Capitol Transit Co., 338 U.S. 286; *United States v. Great Northern R. Co.*, 343 U.S. 562; *American Trucking Assoc., Inc., v. United States*, 344 U.S. 298; *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, cited by appellant (Jurisdictional Statement, page 2) are not in point since the Court there made no fact determinations as to whether or not the appeal was properly taken or to be taken within the sixty or thirty day provision of Section 2101(b).

This Court's traditional rule against piecemeal litigation must prevail. The District Court, by its order, has not effected a *final* determination of the merits of the entire controversy. This Court should not be burdened with the issues here raised until the Commission, upon rehearing, has had an opportunity to consider the transportation controversy upon its merits. Until such rehearing, no one can know whether or not it will be necessary for this Court to hear or determine the issues here raised.

This appeal, not taken within thirty days after the lower court's decision, is not timely and should be dismissed.

MOTION TO AFFIRM

The questions presented by appellant (Jurisdictional Statement, pages 3 and 4) all involve pure questions of fact. This Court is being asked by appellant to review factual matters passed upon by the three-judge District Court after trial.

In *Radio Corp. of America v. United States*, 341 U.S. 412, 95 L.Ed. 1062, this Court held:

> "For as we have pointed out recently, in considering the question of sufficiency of evidence to support in administrative order, this Court must and does rely largely on a first reviewing court's conclusions. Universal Camera Corporation v. National Labor Relations Board, 340 U.S. 474."

We consider questions Nos. 1 and 2 (Jurisdictional Statement, page 3) together for the reason that they both revolve about the single point of notice.

Question No. 1 states that appellant gave notice of hearing before the Interstate Commerce Commission in its application for a certificate. Please note that the appellant does not state *to whom* the notice was given.

Question No. 2 states that appellees had notice of appellant's application and hearing for its certificate.

Each of these questions is answered in the District Court decision, 148 F. Supp. 471 at 473. The Court found as a fact:

> "The plaintiffs, concededly, had no actual notice of Monson's application for the certificate of September 22, 1953. They were afforded no opportunity to be heard in opposition."

On page 474 of the decision the District Court found as a fact that appellant listed and gave notice to certain carriers but failed to notify these appellees whom it knew to have been in direct competition with it at Red Wing, Minnesota, and other points, for many years. The District Court further found that appellant had also failed to make diligent inquiry

to ascertain those carriers with whom the new service would be directly competitive. Appellees, being directly competitive, had no notice whatsoever. In this state of affairs the Commission could and did invoke its "no hearing" procedure. Appellees have always contended that appellant Monson deliberately failed to list or notify appellees with the intended result that the latter could not possibly have known of the pendency of the application, enter protest thereto and demand a hearing.

The complete answer to questions 1 and 2, found as a fact by the District Court, is that appellant gave no notice to appellees and appellees neither received nor had notice of the pendency and consideration of appellant's application.

Questions Nos. 3 and 4 (Jurisdictional Statement, pp. 3 and 4.) Question No. 3 appears to question the District Court's finding that the Interstate Commerce Commission abused its discretion in refusing to waive its Rule 101(e) allowing the reopening of the case. As a fact determination, upon all of the evidence, the District Court found:

> "We conclude that, in view of the exceptional facts and circumstances disclosed, the Commission abused its discretion and acted arbitrarily in denying plaintiffs' application to waive Rule 101(e)." (148 F. Supp. 471, 476.)

The entire matter of laches was before the District Court and testimony taken thereon. It is elementary that laches is a pure matter of fact concerning unreasonable delay. After extensive discussion of the material facts, the District Court concluded:

> "After due consideration, we are of the opinion that the doctrine of laches is not applicable, in view of the unusual and exceptional circumstances which occasioned the delay of which complaint now is made." (148 F. Supp. 471, 476.)

The District Court further said:

> "In addition, it seems clear that by its own conduct Monson (appellant) contributed to the delay which ensued before the plaintiffs (appellees) applied for a waiver of Rule 101(e)." (at page 476.)

The Court's discussion of the evidence preceding the above quotations unquestionably establishes appellant's contribution to the delay and its knowledge that its operations under the questioned certificate were at all times under attack by appellees.

In question No. 3 it is said that the Commission found appellees guilty of laches. This is not true. The Interstate Commerce Commission neither considered nor decided any question of laches of appellees. See Appendix C, "Order" (Jurisdictional Statement, page 28). This Order is the only determination made by the Interstate Commerce Commission in this case after the issuance of the certificate on September 22, 1953. It denied appellees' petition for reopening with the sole statement "because such action is not warranted." The Commission did not find appellees guilty of laches—nor did the District Court.

Following *Radio Corp. of America v. United States*, supra, the questions presented by appellant are fact questions and this Court relies upon the District Court's conclusions respecting the same. The questions presented are not substantial. The motion to affirm should be granted.

In conclusion, we respectfully submit that either the motion to dismiss or the motion to affirm should be granted.

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